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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 518

MORELAND H. HOGAN AND INTERNATIONAL PARK CORPORATION, *Petitioners*

v.

IVOR B. CLARK, INC., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES OF AMERICA AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, Moreland H. Hogan and International Park Corporation, respectfully pray that a writ of certiorari issue to the United States Court of

Appeals for the Second Circuit to review here the decision and judgment of that court rendered on June 14, 1968, in the case of *Ivor B. Clark, Inc., plaintiff*, v. *Moreland H. Hogan, International Park Corporation, and International Office Park, Inc., defendants*, the same being numbered 32287/88 on the docket of said Court.

OPINION BELOW

The judgment of the court below was rendered and entered, without opinion, on the 14th day of June, 1968, at the conclusion of the oral argument. A copy of the judgment is appended hereto (Appendix A).

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the United States District Court for the Southern District of New York, which was affirmed by the decision and judgment of the United States Court of Appeals for the Second Circuit here sought to be reviewed, was erroneous, was an abuse of the discretion vested in the District Courts of the United States by Rule 37(b)(2) of the Federal Rules of Civil Procedure, was entered without due process of law, and deprived your petitioners in certiorari of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

(i) The date of the judgment sought to be reviewed is June 14, 1968. It was entered on the same date.

(ii) No motion for rehearing was filed, and no order has been granted extending the time within which to petition for certiorari.

(iii) Jurisdiction is invoked under Section 1254(1), Title 28, of the United States Code.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a District Court is authorized by Rule 37(b)(2) of the Rules of Civil Procedure to strike the pleadings of a party and enter a judgment by default against him for failure to produce documents pursuant to an order entered under Rule 34 of the Federal Rules of Civil Procedure, in the absence of an affirmative showing that the documents were at the time of the order in the possession, custody or control of the party.

2. Whether a District Court is authorized by Rule 37(b)(2) of the Federal Rules of Civil Procedure to strike the pleadings of a party and enter a judgment by default against him for failure to produce documents pursuant to an order entered under Rule 34 of the Federal Rules of Civil Procedure, without making an express finding of fact that there has been a willful refusal by such party to produce documents which were at the time of the order in his possession, custody or control.

3. Whether the order and judgment of the United States District Court for the Southern District of New York striking the answer of the defendants Moreland H. Hogan and International Park Corporation and entering judgments by default against them, which action and judgments were affirmed by the decision and judgment here sought to be reviewed, was "just" as required by Rule 37(b)(2) of the Federal Rules of Civil Procedure.

4. Whether the order and judgment referred to in the preceding paragraph was, under the facts and circumstances, an abuse of the discretion vested in the District Courts by Rule 37(b)(2) of the Federal Rules of Civil Procedure.

5. Whether, after striking the answer of a defendant for failure to produce documents pursuant to an order entered under Rule 34 of the Federal Rules of Civil Procedure, a District Court has authority under Rule 37(b)(2) of the Federal Rules of Civil Procedure to enter a judgment by default against the defendant where the defendant, a resident of a State other than that in which the court is located, has in his pleadings, by way of an affirmative defense, challenged the court's jurisdiction on the ground it has no jurisdiction of the person, and there has been no determination of that issue.

6. Whether the entry of a judgment by default against a defendant in the circumstances set out in the preceding paragraph would deprive the defendant of due process of law in violation of the Fifth Amendment to the Constitution of the United States.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Rule 34 of the Federal Rules of Civil Procedure, Title 28, United States Code (Appendix B).

Rule 37(b)(2) of the Federal Rules of Civil Procedure, Title 28, United States Code (Appendix C).

The Fifth Amendment to the Constitution of the United States which reads, in part, as follows: "No person shall be . . . deprived of . . . property without due process of law".

STATEMENT OF THE CASE

Ivor B. Clark, Inc., a corporation organized under the laws of the State of New York, filed a complaint in the United States District Court for the Southern District of New York, against Moreland H. Hogan, a

citizen of the State of Georgia, and International Park Corporation, a corporation organized under the laws of Georgia and having its principal place of business in that State, praying judgment in excess of $10,000.00 exclusive of interest and costs, for breach of a contract alleged to have been made in New York.

> [International Office Park Corporation also was named as a defendant, but that corporation is not directly involved because no judgment was entered against it.]

The basis for federal jurisdiction was diversity of citizenship.

Copies of the complaint and summons were served on the defendants Moreland H. Hogan and International Park Corporation in the State of Georgia.

The defendants Moreland H. Hogan and International Park Corporation filed a joint answer in which they denied the material allegations of the complaint and set up the following affirmative defense:

> "As and for a Second Complete Affirmative Defense to Plaintiff's First and Second Claims."
>
> 15. The court lacks jurisdiction over the persons of defendants Hogan and International Park Corporation in that they have not transacted any business in the State of New York relative to the subject-matter of this action and the Court does not otherwise have jurisdiction".

The defendants' affirmative defense of lack of jurisdiction in the court has never been heard and determined.

The court entered an order (Appendix D) under Rule 34 of the Federal Rules of Civil Procedure direct-

ing the defendants Moreland H. Hogan and International Park Corporation to either produce certain documents in the State of New York for inspection and copying by the plaintiff or pay to the plaintiff the traveling expenses and fees of an attorney for the plaintiff to go to the State of Georgia for the purpose of there inspecting and copying such documents.

The plaintiff subsequently moved for an order under Rule 37(b)(2) of the Federal Rules of Civil Procedure striking the answer of the defendants Moreland H. Hogan and International Park Corporation "on the ground they have refused to obey" the order requiring the production of the documents.

Thereupon, the defendant Moreland H. Hogan (who is President of the defendant International Park Corporation) submitted to the court an affidavit in which he said, among other things:

> "I have made a diligent search of the records of International Park Corporation and have forwarded those documents which pertain to the above mentioned case to my attorney, Mr. John L. Hawkins, of the firm of Boyden, Sarnoff & Hawkins, 140 Broadway, New York, New York. . . . I have not deliberately or otherwise withheld any documents pertaining to the case".

The court then entered an order (Appendix E) reciting that the order directing the defendants to produce the documents was entered without opposition and that "from this fact, we infer that when these documents were directed to be produced, not only were they in existence but they were in the possession of or under the control of said defendants".

The order provided that "unless the documents called for are produced in this District on or before Jan-

uary 22, 1968, this motion will be granted and an order may in that event be submitted striking the answers of said defendants".

Thereafter, the defendant Moreland H. Hogan submitted a second affidavit in which he stated that he had made a further diligent search and could not locate the papers called for other than those he had sent to his New York attorneys to be produced in the proceeding.

Thereupon, the court, acting on its "inference" that the documents were in the defendant's possession, custody or control, entered an order (Appendix F) striking the answer of the defendants Moreland H. Hogan and International Park Corporation and directing that judgment be entered against Moreland H. Hogan on the first claim of the complaint "in the sum of $85,000.00 with interest thereon from the 1st day of July, 1965", and that judgment be entered against Moreland H. Hogan and International Park Corporation "in the sum of $77,000.00, together with interest thereon from the 1st day of April, 1966 . . .".

Judgment was entered against the defendants Moreland H. Hogan and International Park Corporation as directed, and they filed an appeal to the United States Court of Appeals for the Second Circuit, which Court affirmed the judgment entered by the District Court (Appendix A).

REASONS FOR ALLOWING THE WRIT

We respectfully say that the writ of certiorari ought to be granted in the case at bar because the United States Court of Appeals for the Second Circuit, in affirming the judgment of the United States District Court for the Southern District of New York, decided

federal questions of gravity and importance which have not been, but should be, settled by this Honorable Court.

The effect of its decision and judgment was to hold:

1. That the District Courts are authorzied by Rule 37(b)(2) of the Federal Rules of Civil Procedure to strike the pleadings of a party and enter a judgment by default against him for failure to produce documents pursuant to an order entered under Rule 34 of the Federal Rules of Civil Procedure, without an affirmative showing that the documents were at the time of the order in the possession, custody or control of the party.

There was no affirmative showing that the documents ordered to be produced were in the possession, custody or control of the defendants.

In its order of September 2nd, 1967 (Appendix D), the District Court directed the defendants Moreland H. Hogan and International Park Corporation to either produce certain documents in New York or pay the fees and expenses of plaintiff's counsel in going to Georgia for the purpose of inspecting and copying the documents.

On November 13th, 1967, the defendant Hogan submitted an affidavit (Appendix G), which, though couched in the language of a layman and less definite than might be desired, showed clearly that the defendants did not have in their possession, custody or control any of the documents which had not been forwarded to their New York counsel for production.

However, the District Court disregarded this affidavit, and in its order of January 16th, 1968 (Appendix E) that the motion to strike the defendants' answer would be granted unless the docu-

ments were produced in New York "on or before January 22, 1968," took the position that since the order of September 2nd, 1967, requiring their production was entered "without opposition", it had the right to "infer that when the documents were directed to be produced, not only were they in existence but they were in the possession of or under the control of said defendants".

2. That the District Courts are authorized by Rule 37(b)(2) of the Federal Rules of Civil Procedure to strike the pleadings of a party and enter a judgment by default against him for failure to produce documents pursuant to an order entered under Rule 34 of the Federal Rules of Civil Procedure, without making an express finding of fact that there has been a willful refusal by such party to produce documents which were at the time of the order in his possession, custody or control.

In its order of February 8, 1968, striking the defendants' answers and directing that judgments be entered against the defendants (Appendix F), the District Court merely recited its previous order of January 16, 1968, and stated that "there is no just reason for delay in entry of final judgment against defendants . . .".

3. That in a case where a defendant has in his pleadings, by way of an affirmative defense, challenged the court's jurisdiction on the ground it has no jurisdiction of the person, a District Court may, after striking such defendant's answer pursuant to the provisions of Rule 37(b)(2) of the Federal Rules of Civil Procedure lawfully enter a judgment by default against him, without first determining the question raised as to its jurisdiction.

> We do not believe there can be any question that the entry of the judgment deprived the defendants of due process of law. They had the right to be heard on the issue of whether the District Court in New York was without jurisdiction, and that issue will be forever precluded by the judgment, if the judgment is allowed to stand.

We also submit that the action of the District Court in striking the defendants' answer and entering judgment by default against them, was capricious and arbitrary and an abuse of the discretion vested in the District Courts by Rule 37(b)(2).

It will be seen that the order of January 16, 1968 (Appendix E) and the order striking the defendants' answer were entered without a hearing. The District Court simply "inferred" that the documents not produced were in the possession or control of the defendants. Surely, justice would require that the Court give the defendants an opportunity to be heard before resorting to the drastic action of striking their answer.

WHEREFORE, your petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit in order that the decision and judgment of that court affirming the judgment of the United States District Court for the Southern District of New York may be reviewed and corrected.

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